December 8, 1998 Invoice re: duplication		X	New associate review file for 10 hours at $110/hr, other duplication	(A reduction for duplication is made elsewhere)
January 10, 2000 Invoice Re: preparation for mediation		X	14 hours at $150/hr for one attorney to prepare for mediation is excessive	4 hours at $150/hr = $600.00
March 28, 2000 Invoice Re: New associate		X	Trial preparation for new associate who did not participate in the trial.	15 hours at $100/hr = $1500.00
Post-Verdict Request		X	The FLSA claim was a discrete claim which was unsuccessful. A paying client would reasonably expect to pay for the other work.	$5,000.00
Attorneys' Fees for Fee Application		X	No reasonable paying client would pay over $38,000 in attorneys' fees for preparation of his own bill.	$25,000.00
			TOTAL DEDUCTIONS:	$37,728.00

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE FILED JULY 26, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:96-cv-916
(MURRIAN)

GARY G. SHARPE, et al,

Plaintiffs,

v.

FIRE CHIEF BRUCE CURETON, et al,

Defendants.

MEMORANDUM OPINION

The plaintiffs' second motion to alter or amend judgment is before the undersigned [Doc. 345]. The defendants have responded [Doc. 348]. The plaintiffs filed a reply [Doc. 349]. Oral arguments were conducted on June 29, 2000.

Pursuant to Fed. R. Civ. P. 59(e), the defendant moves to alter or amend the Order filed in this case *nunc pro tunc* to May 8, 2000 [Doc. 354]. The plaintiffs seek relief from the undersigned's rulings in that Order pertaining to (1) the statute of limitations as it pertains to four of the plaintiffs'

transfers in September, 1995, (2) the need for injunctive relief, (3) William Potter's Fair Labor Standards Act claim, (4) prejudgment interest, and (5) the taxing of costs.

I. *Procedural Issue*

In their response, the defendants raise a procedural question that will be addressed first. The defendants argue that the court's Memorandum Opinion filed April 25, 2000, resolved all of the remaining issues in this litigation between the parties with the exception of costs and therefore it constituted a final order. As such, the defendants argue that any motion to alter or amend the judgment had to be filed within 10 days of that final order.[1] Defendants contend that the instant Rule 59(e) motion can only be considered under Fed. R. Civ. P. 60(b).[2]

---

1. Rule 59(e) provides as follows:

> **Motion to Alter or Amend Judgment.** Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

2. Rule 60(b) provides, in pertinent part, as follows:

> **Mistakes; Inadvertence; Excusable Neglect: Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial

(Cont'd)

Appendix C

The final paragraph of the Memorandum Opinion filed April 25, 2000, provided as follows:

> A hearing in connection with defendants' motion to tax costs pursuant to Fed. R. Civ. P. 68 and 28 U.S.C. § 1920 is hereby scheduled to commence at **1:30 p.m. on Tuesday, May 16, 2000.** Entry of a final order will await a determination of how costs should be assessed.[3]

(Cont'd)

> under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

3. Although entry of judgment and taxation of costs are entirely separate legal acts, Rule 58 permits, but does not require, the court to delay finality of judgment until an attorney fee dispute is decided. Wright, Miller & Kane, *Federal Practice and Procedure*: *Civil 2d* § 2781 at 13 (1995). There was an issue of attorneys' fees under 42 U.S.C. § 1988 to be decided when the Memorandum Opinion was filed.

Appendix C

File:
/s/
Robert P. Murrian
United States Magistrate Judge

[Doc. 334 at 36].

At the plaintiffs' request, the undersigned intended to enter a final order thirteen days later on May 8, 2000 [Doc. 40]. That order recited that "[f]or the reasons stated in the Memorandum Opinion passed to the Clerk on April 25, 2000, it is **ORDERED**. . . ." [Doc. 40 at 3]

Due to a clerical error, a separate judgment was not entered thereon as required by Fed. R. Civ. P. 58. When the error was discovered, the Clerk was ordered to enter judgment *nunc pro tunc* to May 8, 2000 [Doc. 350]. That was done pursuant to Fed. R. Civ. P. 60(a).[4] *See* Second Amended Judgment [Doc. 354].

The Memorandum Opinion filed April 25, 2000, did not meet the procedural requirements of a final, appealable order.

---

4. This Rule provides:

> **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Aside from the fact that it expressly so stated, after the 1963 amendment to Rule 58 "[i]t no longer is possible . . . for an opinion to have the effect of a judgment. Instead there must be a separate document on which the judgment is set forth." Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2785 at 18 (1995), *citing United States v. Indrelunas*, 411 U.S. 216, 93 S.Ct. 1562 (1973); *see also United States v. Woods*, 885 F.2d 352, 353 (6th Cir. 1989).

Accordingly, the final order and judgment was entered in this case *nunc pro tunc* to May 8, 2000, and plaintiffs have filed a timely motion to alter or amend which will be considered on its merits.

II. *Statute of Limitations*

The undersigned dealt with this at length in the Memorandum Opinion filed April 25, 2000 [Doc. 334]. The Sixth Circuit recently discussed the statute of limitations in 42 U.S.C. § 1983 actions tried in Tennessee's federal courts.

> Hughes does not dispute the magistrate judge's use of Tennessee's one-year statute of limitations as the controlling statute. Indeed, "[i]n all actions brought under § 1983 alleging a violation of civil rights or personal injuries, the state statute of limitations governing actions for personal injuries is to be applied." *Berndt v. Tennessee*, 796 F.2d 879, 883 (6th Cir. 1986). Following this rule, the applicable limitations period in Tennessee is one year. *See* Tenn. Code Ann. § 28-3-104(a)(1).

Appendix C

> The real dispute between the parties concerns when the one year began to run. Both sides refer to *McCroskey v. Bryant Air Conditioning Co.*, 524 S.W.2d 487 (Tenn. 1975), as setting forth Tennessee's rule on that issue. Federal law, however, controls the determination of when a civil rights action accrues. *See Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984). In *Sevier*, this court concluded as follows: "The statute of limitations commences to run when the plaintiff knows or has reason to know of the injury which is the basis of his action. A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence." *Id.* at 273 (citations omitted). This court has also stated that "[i]n determining when the cause of action accrues in section 1983 actions, we have looked to what event should have alerted the typical lay person to protect his or her rights." *Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991).

Hughes v. Vanderbilt University, __ F.3d __, 2000 WL 726477 *4, No. 99-5499 (6th Cir., decided and filed June 7, 2000), slip op. at 8.

I remain convinced that the September 1995 transfers had that degree of permanence which should have (and, in fact, did trigger plaintiffs' awareness) triggered a typical lay person's awareness of and duty to assert his or her rights. These transfers therefore started the one-year statute of limitations running and suit was not filed until thirteen

months later. *Anderson v. City of Bristol, Tennessee*, 6 F.3d 1168, 1175 (6th Cir. 1993) ("[T]he key is whether the original discriminatory act had the degree of permanence that should trigger an employee's awareness of and duty to assert his or her rights." (internal quotations and citations omitted)); *Huckaby v. Moore*, 142 F.3d 233, 238 (5th Cir. 1998) ("The core idea of the continuing violations theory . . . is that equitable considerations may very well require that the filing periods not begin to run until facts are supportive of a Title VII charge or civil rights action are or should be apparent to a reasonably prudent person similarly situated. The focus is on what event, in fairness and logic, should have alerted the average lay person to act to protect his rights"); *Sabree v. United Brotherhood of Carpenters and Joiners*, 921 F.2d 396, 401-02 (1st Cir. 1990) (There must be a substantial relationship between a timely claim and untimely claims to constitute a continuing violation and where the untimely claims put the plaintiff on inquiry notice, there is no such substantial relationship).

The defendants' failure to re-transfer the plaintiffs to their original locations for about eleven months was not a discriminatory act or continuing violation of plaintiffs' rights; rather, the plaintiffs' status during this period of time was simply the result of discrete acts—the 1995 transfers. *United Airlines v. Evans*, 431 U.S. 553, 557-58; 97 S.Ct. 1885, 1888-89 (1977); *Sabree*, 921 F.2d at 400.

"Repeated requests for further relief from a prior act of discrimination will not set the time limitations running anew." *EEOC v. McCall Printing Corp.*, 633 F.2d 1232,

1237 (6th Cir. 1980). Residual effects of prior acts of discrimination do not constitute continuing violations of one's rights. *Id.*

Where there are discrete, specific acts of alleged discrimination (like the September, 1995 transfers) which are not substantially related to any later acts of discrimination, the continuing violation doctrine does not apply. The *Sabree* case correctly defines how one determines the relatedness or unrelatedness of acts occurring outside the statute of limitations period to those occurring within. 921 F.2d at 401-02. The degree of permanence of the untimely action is the single most important factor. *Id.* Likewise, the Sixth Circuit considers the degree of permanence "key" in deciding whether an act of discrimination should be considered as a part of a continuing violation or a separate act that starts the statute of limitations running. *Anderson v. City of Bristol, Tennessee*, 6 F.3d at 1175. Even where there is proof of events over a period of years that could be construed as a longstanding policy of discrimination, **unrelated** incidents of discrimination will not suffice to invoke the exception to the normal rule that statutes of limitations accrue when the discriminatory act occurred. *Haithcock v. Frank*, 958 F.2d 671, 678 (6th Cir. 1992). For purposes of plaintiffs' continuing violation theory in this case, the September, 1995 transfers were, as a matter of law, unrelated to the subsequent acts of discrimination against the plaintiffs under the teachings of *Sabree* and *Anderson v. City of Bristol, Tennessee.*

In the instant case, the September, 1995 transfers had such permanence (*i.e.*, what the plaintiffs knew or should have known at the time of the transfers) that, as a matter of

law, the one-year statute of limitations began running against them. The jury's award of damages for the September, 1995 transfers therefore cannot stand.

Plaintiffs place particular emphasis on the case of *Bell v. Chesapeake and Ohio Railway Co.*, 929 F.2d 220 (6th Cir. 1991).[5] In particular, they point to the following language:

> Hence, application of the third element of the continuing violation doctrine [permanency] requires the court to determine when the plaintiff discovered he was a victim of the continuing policy or pattern of discrimination. Acts occurring before that date and outside the statute of limitations are barred as the basis for any cause of action, **unless the plaintiff can demonstrate that they are the results of a policy and at least one act occurred within the limitations period.**

929 F.2d at 224 (emphasis added). The plaintiffs point to the testimony of Patrick Cummins as an example of how Mayor Ashe has had a longstanding policy of retaliation against his political opponents. Cummins was an Ashe supporter when he first ran for Mayor in 1988. He testified at trial that after Ashe was elected, Ashe personally scratched the names of his political opponents off the firefighter eligibility list for promotions. He also testified that some promotions of

5. Bell represents the legal standard under Michigan law for continuing violations and its application to this federal civil rights case is questionable at best. *Gibb v. Kemp*, 999 F.3d 539 (6th Cir. 1993) (table); 1993 WL 265161 **3. The court cites *Haithcock v. Frank*, *supra*, as stating the correct legal standard.

firefighters were meted out by Ashe in 1988 based on who had supported him in the election and not merit. Cummins testified that Mayor Ashe had a remarkable memory for those who had supported him. Cummins also related how he believed that he had been demoted and otherwise discriminated against after he supported Ashe's opponents in the 1992 and 1996 mayoral elections.

There was this evidence and other evidence in the record which, if believed, support a jury finding that there was an over-arching policy of retaliation against the mayor's political opponents. At this point in the case, it must be assumed that the jury so found. The jury also found that two of the plaintiffs (Ken Scarbrough and Frank Potter) were denied merit pay or bonuses for the years 1995 or 1996. These violations of the plaintiffs' rights would have occurred in approximately December, 1995 and December, 1996. Viewing the evidence in a light most favorably to plaintiffs, as must be done at this time, I will assume the jury found that the plaintiffs were denied merit or bonus pay in December, 1995—that would have been a violation of plaintiffs' civil rights within the one year preceding the filing of this suit in October, 1996.

Even assuming these predicate facts, I do not find that the language cited and relied upon by plaintiffs in *Bell v. Chesapeake and Ohio Railway* applies here. That case was brought seeking relief for alleged racial discrimination in the workplace under Michigan's civil rights in employment law. The court held that the plaintiff had "failed to state a cause of action under the continuing violation theory." 929 F.2d at 222. The court noted that the incidents of alleged racial hostility toward him "were isolated occurrences over

a nine-year period." *Id.* at 225. The court found that plaintiff had not demonstrated some type of policy of encouraging or indifference toward racial hostility on the defendant's part, that the acts complained of were spread over nine years and were too infrequent to be labeled a "continuing course of conduct" and that each of the acts "**should have made [defendant] aware he had suffered injury, thereby imposing on him the duty to bring this action within the limitations period.**" *Id.* (emphasis added).

Thus, the court found three separate reasons that the continuing violation theory did not save plaintiffs' claim.

The court relied on the case of *Berry v. Board of Supervisors of Louisiana State University*, 715 F.2d 971 (5th Cir. 1983) in discussing the "permanence rule" which I have relied on in this case, and the court described the holding in *Berry* as follows:

> The case involved a female university professor who had a heavier workload than her male counterparts. She was permitted to sue on the basis of actions that occurred outside the limitations period because it was not obvious that she was the victim of a discriminatory policy until she had been on the payroll for a few years with a heavy course load while those of her male counterparts were lighter. **In other words, the worker did not—and could not—become aware of the need to take legal action to vindicate her rights until a period of time had elapsed.**

929 F.2d at 224 (emphasis added). The language relied upon by plaintiffs, and quoted above, immediately follows this quote from the opinion.

The "permanence element" of the continuing violation theory requires a court to differentiate between "(1) the continuing effects of past discrimination that is no longer actionable because of the statute of limitations, and (2) a discriminatory act that was part of a pattern and which brings to the attention of the victim the fact of the continuing violation." *Id.* at 223. The court noted that the **most important reason** for granting a plaintiff relief under the continuing violation theory "is that many discriminatory acts occur in such a manner that it is difficult to define precisely when they took place. . . . One might say they unfold rather than occur." *Id.* That is certainly not the situation in this case. These four plaintiffs had no difficulty in concluding that their civil rights had been violated as soon as the transfers occurred.

The instant case does not involve plaintiffs who did not—and could not—become aware of the need to protect their rights until a period of time had passed. *See id.* at 224. These four plaintiffs believed immediately in September, 1995 that their constitutional rights had been violated by the transfers. Reasonable minds simply could not differ about that. "The focus is on what event, in fairness and logic, should have alerted the average lay person to act to protect his rights." *Huckaby v. Moore*, 142 F.3d 233, 238 (5th Cir. 1998); *see also Anderson v. City of Bristol, Tennessee,* 6 F.3d 1168, 1175 (6th Cir. 1993). These transfers were discrete acts of

discrimination which, under the facts of this case and as a matter of law, started the one-year statute of limitations running.

The plaintiffs' motion to alter or amend the judgment with respect to the running of the statute of limitations will be denied.

III. *Injunctive Relief*

Plaintiffs move to alter or amend the judgment and underlying findings of fact and conclusions of law regarding injunctive relief contained in the Memorandum Opinion filed April 25, 2000.

The plaintiffs argue strenuously that the court has failed to recognize that there is a clear threat that irreparable injury will occur to them if this relief is not granted and that no other adequate remedy is available. *See City of Parma v. Levi*, 536 F.2d 133, 135 (6th Cir. 1976). The plaintiffs argue that without an injunction there is no deterrent in place that will avoid continuation of Mayor Ashe's unconstitutional actions, that money damages alone do not suffice to repair the injury caused by the mayor's unconstitutional actions, that none of the existing legal remedies deterred the mayor from pursuing his pervasive and persistent policy of punishing public employees who exercise their First Amendment rights to freedom of political affiliation or to seek redress in the courts, that the mayor has refused to admit the unconstitutionality of his actions, that there is no assurance that the mayor will not retaliate against plaintiffs and others in the nearly four years remaining in his term, that retaliation for filing this

lawsuit would not be grievable before the Civil Service Merit Board, that the court erred in considering the fact that no punitive damages were awarded and that only an injunction can protect the interests at stake.

I am persuaded that the plaintiffs are right and that the judgment should be altered and amended to include injunctive relief. After further briefing and arguments by counsel and after further reflection and study by the undersigned, the undersigned is convinced that the judgment should be amended to grant such relief.

The First Amendment rights at issue here (political belief and association, access to the courts without fear of retaliation) are at "the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356, 96 S.Ct. 2673, 2681 (1976). "Patronage . . . to the extent it compels or restrains belief and association is inimical to the process which undergirds our system of government and is at war with the deeper traditions of democracy embodied in the First Amendment." *Id.*, 427 U.S. at 357, 96 S.Ct. at 2682 (internal quotation omitted).

One recurring and disturbing position espoused by the defendants throughout this litigation has been that involuntary transfers and the denial of merit pay and bonuses cannot be First Amendment violations because such actions are merely private personnel grievances and not matters of public concern. *See* Memorandum Opinion filed November 13, 1997, at 14 [Doc. 164]. When this case was appealed to the Sixth Circuit, the issue presented was "whether, as of 1995, it was clearly established that retaliatory personnel

actions of the type complained of here were sufficiently 'adverse' to be actionable." *Sharpe v. Cureton*, 172 F.3d 873, 1999 WL 55274 (6th Cir. January 13, 1999) (table). The court answered with a clear "yes."

> The defendants argue that they are entitled to qualified immunity, notwithstanding any violation of the plaintiffs' First Amendment rights, "because reasonable officials in defendants' respective positions could have believed their actions lawful under the specific facts and circumstances known to them." We disagree.
>
> The "specific facts and circumstances" known to the defendants, *ex hypothesi,* included knowledge that the transfers and other adverse employment actions of which the plaintiffs complain were retaliatory in nature. Yet as early as 1982, the Seventh Circuit's *Rutan* panel noted, it had been held that "even an act of retaliation as trivial as failing to hold a birthday party for a public employee could be actionable when intended to punish her for exercising her free speech rights." *Rutan v. Republican Party of Illinois*, 868 F.2d 943, 954 n.4 (7th Cir. 1989), *citing Bart v. Telford,* 677 F.2d 622 (7th Cir. 1982). *Rutan* itself was not a retaliation case, of course, but the Supreme Court's *Rutan* [*v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729 (1990)] opinion gave this endorsement to the Seventh Circuit's dictum on retaliation: "[T]he First Amendment, as the court below noted, already protects state employees not

> only from patronage dismissals but also from 'even an act of *retaliation* as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights.'" *Rutan*, 497 U.S. 62, 75 n.8 (emphasis supplied).
>
> The Supreme Court's opinion in *Rutan* had been in the public domain for five years by the time of the acts complained of here, while our court's opinion in *Bloch*, 156 F.3d 673 [6th Cir. 1998]—an opinion in which we adopted the "person of ordinary firmness" test—was still three years in the future. The defendants have never given a satisfactory answer to the question of how a reasonable official could read the Supreme Court's opinion in *Rutan*, including footnote 8, and still consider it constitutional to punish the plaintiffs in the manner the plaintiffs claim to have been punished for exercising their free speech rights.

Id. at **2-3.

The jury did not award the plaintiffs a substantial amount of damages, but this is not uncommon in civil rights actions such as this one. The jury did find that all five plaintiffs suffered retaliation as a result of their filing of this lawsuit, that two of the plaintiffs were denied merit or bonus pay because they did not support Mayor Ashe in the 1995 election and found that three of the plaintiffs were transferred in September, 1995 because they failed to support the Mayor

in the election. The defendants refused to even consider plaintiffs for merit or bonus pay in 1996 because the plaintiffs had filed this lawsuit.

As I discussed in Part II of this opinion, there was evidence from which a reasonable jury could conclude that political retaliation against political enemies among firefighters by the mayor's office has gone on for some time. At this point in the case, that evidence must be viewed in a light most favorable to the plaintiffs. There has never been a clear, public acknowledgment of responsibility for violation of the plaintiffs' civil rights from either defendant adjudged responsible for doing so by the jury. Neither has there been an assurance to city employees that it will not happen again. Moreover, it needs to be emphasized in a most clear and effective way that the freedoms of political belief and political association are hard-won and precious freedoms which are not to be trifled with and that the federal courts are able to effectively deal with those who attempt to do so. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 2690 (1976).

It is likely that this is not the first city administration to engage in activities based on the political beliefs and political associations of city employees. Counsel for the defendants has made the argument several times that one of the plaintiffs was the beneficiary of political favoritism by a previous administration. Even if true, this does not excuse the violations of First Amendment rights which the jury found to have occurred in the instant case. It is time for such activities to cease.

For the reasons indicated, a permanent injunction will enter enjoining defendant Victor Ashe from discriminating against Knoxville firefighters on account of their political opinions and affiliations, past, present or future, provided, however, that the injunction shall not apply to policymaking and confidential employees of the city who do not enjoy civil service protection. *See Branti v. Finkel*, 445 U.S. 507, 517, 100 S.Ct. 1287, 1294 (1980).

IV. *Fair Labor Standards Act*

For the reasons stated in the Memorandum Opinion filed April 25, 2000, the motion to alter or amend the judgment regarding William Potter's Fair Labor Standards Act claim will be denied [Doc. 334].

V. *Prejudgment Interest*

For the reasons stated in the Memorandum Opinion filed April 25, 2000, the motion to alter or amend the judgment regarding an award of prejudgment interest to plaintiffs will be denied [Doc. 334].

VI. *Taxing of Costs*

On December 6, 1996, the defendants made their initial Rule 68 offers of judgment to the plaintiffs.[6] A second set

6. Fed. R. Civ. P. 68 provides as follows:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or

(Cont'd)

was made on November 4, 1997. These offers of judgment have assumed a great deal of significance in this case because plaintiffs' attorneys' fees and other costs are substantial and the Rule 68 offers of judgment may or may not have shifted the burden of paying costs and may have extinguished defendants' responsibility to pay plaintiffs' attorneys' fees after the offers were made pursuant to 28 U.S.C. § 1988(b).[7] *See Marek v. Chesny*, 473 U.S. 1, 105 S.Ct. 3012 (1985).

(Cont'd)

> to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

7. This statute provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of

(Cont'd)

Appendix C

The plaintiffs argue that the offers of judgment were insufficiently definite to constitute valid offers.

Contract principles apply in determining whether or not a valid offer of judgment has been made, *e.g.* "[t]here must be a meeting of the minds." *Johnson v. University College of the University of Alabama in Birmingham*, 706 F.2d 1205, 1209 (11th Cir.), *cert. denied*, 104 S.Ct. 489 (1983). There must be a "clear understanding of the terms [of an offer of judgment] in order to have a valid acceptance of the offer." *Boorstein v. The City of New York*, 107 FRD 31, 33-34 (S.D. N.Y. 1985). For example, an offer to allow judgment against a defendant for "100,000 mcf [presumably, a million cubic feet] of gas" was too ambiguous to constitute a valid offer of judgment because the defendant did not specify the value of the gas and refused to clarify the offer. *Arkla Energy Resources, etc. v. Roye Realty and Developing, Inc.*, 9 F.3d 855, 867 (10th Cir. 1993).

"The defendant must show that the offer was more favorable than the judgment and that the mandatory cost-shifting provision was therefore triggered." *Gavoni v. Dobbs House, Inc.*, 164 F.3d 1071, 1075-1076 (7th Cir. 1999).

> Defendants should bear this burden for two reasons. First, because Rule 68's cost-shifting

(Cont'd)

> this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et seq.*], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

> provision is mandatory and applies to individual parties—the "offeree must pay the costs incurred" by the offeror . . .—plaintiffs face serious consequences in either accepting or rejecting a Rule 68 offer. . . . A judgment less favorable than the offer requires that a plaintiff pay the defendant's usually substantial post-offer costs. There must therefore be a clear baseline from which plaintiffs may evaluate the merits of their case relative to the value of the offer . . . . Second, courts also need easily comparable sums. In applying Rule 68, courts have "no discretion to alter or modify the parties' agreement." . . .

Id. at 1076 [citations omitted] [emphases omitted]. The central issues in the instant case regarding the offers of judgment are (1) were the plaintiffs given a "clear baseline" from which they could evaluate the merits of their case relative to the values of the offers and, (2) were the plaintiffs and the court provided with "easily comparable sums?" *Id.* The court must examine the terms of the offers when rejected and not with 20-20 hindsight. Where "a defendant is on notice that the plaintiff, with reason, interprets the offer differently, the defendant is not entitled to the benefits of Rule 68, unless he amends his offer to remove doubt as to its meaning." *Lish v. Harper's Magazine Foundation*, 148 F.R.D. 516, 519 (S.D. N.Y. 1993). The following offers of judgment were made in this case.

> RULE 68 OFFER OF JUDGMENT – WILLIAM POTTER
>
> The defendants in the above styled lawsuit do hereby appear and make this offer of judgment

pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Defendants offer William G. Potter the following:

1. Potter shall retain his title of Administrative Deputy Chief of Firefighting;

2. Potter shall be paid his former administrative hourly rate of pay for any hours worked in excess of forty (40) hours per week, from and after February 1, 1996, on the hourly rate of:

> (a) $21.2544 per hour for the time period of February 1, 1996 through July 6, 1996; and
>
> (b) the hourly rate of $21.7670 per hour for the time period from and after July 7, 1996 to the date of the next annual pay adjustment provided however that actual overtime pay already received by Potter shall be credited to the pay calculated hereunder and shall be deducted from the accrued amount payable from February 1, 1996, through the date of this offer;

3. An agreement by the Defendants not to engage in any discriminatory practices in the future based upon political affiliation;

4. Payment of reasonable attorney's fees and costs accrued to date and incurred in the prosecution of this civil rights lawsuit to the attorney for the Plaintiff in accordance with 42 *U.S.C.* § 1988; and

5. Payment for damages in the amount of One Thousand One and No/100 Dollars ($1,001.00).

FIRST RULE 68 OFFER OF JUDGMENT – GARY SHARPE

The Defendants in the above styled lawsuit do hereby appear and make this offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Defendants offer Gary G. Sharpe the following:

1. The promotion to the rank of *Fire Officer* effective from and after *February 4, 1996*;

2. Reimbursement for any loss in back pay calculated as follows: (a) two step merit increase effective January 7, 1996; (b) an additional two steps for the promotion to Fire Officer effective February 4, 1996; and (c) payment of any overtime deficiency in accrued overtime resulting from the increases in hourly rate of pay as calculated in (a) and (b).

3. An agreement by the Defendants not to engage in any discriminatory practices in the future based upon political affiliation;

4. Payment of reasonable attorney's fees and costs accrued to date and incurred in the prosecution of this civil rights lawsuit to the attorney for the Plaintiff in accordance with 42 *U.S.C.* § 1988; and

5. Payment for damages in the amount of One Thousand One and No/100 Dollars ($1,001.00).

SECOND RULE 68 OFFER OF JUDGMENT – GARY SHARPE

The Defendants in the above styled lawsuit do hereby appear and make this offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Defendants offer Gary G. Sharpe the following:

1. The promotion to the rank of *Fire Officer* effective from and after *February 4, 1996*;

2. Reimbursement for any loss in back pay calculated as follows:

(a) two step merit increase effective January 7, 1996;

(b) an additional two steps for the promotion to Fire Officer effective February 4, 1996;

(c) an additional two step increase effective January 1997; and

(d) payment of any overtime deficiency in accrued overtime resulting from the increases in hourly rate of pay as calculated in (a), (b) and (c).

3. An agreement by the Defendants not to engage in any discriminatory practices in the future based upon political affiliation;

4. Payment of reasonable attorney's fees and costs accrued to date and incurred in the prosecution of this civil rights lawsuit to the attorney for the Plaintiff in accordance with 42 *U.S.C.* § 1988; and

5. Payment of an additional amount of Seven Thousand, Five Hundred One and No/100 Dollars ($7,501.00).

RULE 68 OFFER OF JUDGMENT – FRANK POTTER

The defendants in the above styled lawsuit do hereby appear and make this offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Defendants offer Frank Potter the following:

1. A two step merit increase effective January 7, 1996;

2. An agreement by the Defendants not to engage in any discriminatory practices in the future based upon political affiliation;

3. Payment of reasonable attorney's fees and costs accrued to date and incurred in the prosecution of this civil rights lawsuit to the attorney for the Plaintiff in accordance with 42 *U.S.C.* § 1988; and

4. Payment for damages in the amount of Five Hundred One and No/100 Dollars ($501.00).

SECOND RULE 68 OFFER OF JUDGMENT – FRANK POTTER

The defendants in the above styled lawsuit do hereby appear and make this offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Defendants offer Frank Potter the following:

1. A two step merit increase effective January 7, 1996 plus payment of any back pay associated with said two step increase;

2. A two step merit increase effective January 1997 plus payment of any back pay associated with said two step increase;

3. An agreement by the Defendants not to engage in any discriminatory practices in the future based upon political affiliation;

4. Payment of reasonable attorney's fees and costs accrued to date and incurred in the prosecution of this civil rights lawsuit to the attorney for the Plaintiff in accordance with 42 *U.S.C.* § 1988; and

5. Payment for damages in the amount of Seven Thousand, Five Hundred One and No/100 Dollars ($7,501.00).

RULE 68 OFFER OF JUDGMENT – KENNETH SCARBROUGH

The defendants in the above styled lawsuit do hereby appear and make this offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Defendants offer Kenneth Scarbrough the following:

1. A two step merit increase effective January 7, 1996;

2. An agreement by the Defendants not to engage in any discriminatory practices in the future based upon political affiliation;

3. Payment of reasonable attorney's fees and costs accrued to date and incurred in the prosecution of this civil rights lawsuit to the attorney for the Plaintiff in accordance with 42 *U.S.C.* § 1988; and

4. Payment for damages in the amount of Five Hundred One and No/100 Dollars ($501.00).

Appendix C

SECOND RULE 68 OFFER OF JUDGMENT – KENNETH SCARBROUGH

The defendants in the above styled lawsuit do hereby appear and make this offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Defendants offer Kenneth Scarbrough the following:

1. A two step merit increase effective January 7, 1996 plus payment of any back pay associated with said two step increase;

2. An agreement by the Defendants not to engage in any discriminatory practices in the future based upon political affiliation;

3. Payment of reasonable attorney's fees and costs accrued to date and incurred in the prosecution of this civil rights lawsuit to the attorney for the Plaintiff in accordance with 42 *U.S.C.* § 1988;

4. A two step merit increase effective January 1997 plus payment of any back pay associated with said two step increase; and

5. Payment for damages in the amount of Seven Thousand, Five Hundred One and No/100 Dollars ($7,501.00).

Appendix C

RULE 68 OFFER OF JUDGMENT – WILLIAM MCGINNIS

The defendants in the above styled lawsuit do hereby appear and make this offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Defendants offer William H. McGinnis the following:

1. Cycle pay in the amount of One Hundred Forty-Five and 15/100 ($145.15);

2. A two step merit increase effective January 7, 1996;

3. An agreement by the Defendants not to engage in any discriminatory practices in the future based upon political affiliation;

4. Payment of reasonable attorney's fees and costs accrued to date and incurred in the prosecution of this civil rights lawsuit to the attorney for the Plaintiff in accordance with 42 *U.S.C.* § 1988; and

5. Payment for damages in the amount of Five Hundred One and No/100 Dollars ($501.00).

SECOND RULE 68 OFFER OF JUDGMENT – WILLIAM MCGINNIS

The Defendants in the above styled lawsuit do hereby appear and make this offer of judgment

pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Defendants offer William H. McGinnis the following:

1. Cycle pay in the amount of One Hundred Forty-Five and 15/00 Dollars ($145.15);

2. A two step merit increase effective January 7, 1996 plus payment of any back pay associated with said two step increase;

3. A two step merit increase effective January 1997 plus payment of any back pay associated with said two step increase;

4. An agreement by the Defendants not to engage in any discriminatory practices in the future based upon political affiliation;

5. Payment of reasonable attorney's fees and costs accrued to date and incurred in the prosecution of this civil rights lawsuit to the attorney for the Plaintiff in accordance with 42 *U.S.C.* § 1988; and

6. Payment of an additional amount of Seven Thousand, Five Hundred One and No/100 Dollars ($7,501.00).

It was not until after trial that defendants placed actual dollar figures on the value of the offers to provide plaintiffs Sharpe, Frank Potter, Scarbrough, and McGinnis with merit pay increases. *See* Defendants' Motion to Tax Costs Pursuant

to Federal Rule of Civil Procedure 68 and 28 U.S.C. § 1920 [Doc. 306]. Thomas Patrick Armstrong, Fire Planning and Operations Manager for the City of Knoxville, calculated the value of the Rule 68 offers to plaintiffs, if they had accepted them, up to the pay period ending January 29, 2000. His affidavit is dated February 22, 2000. The figures contained in it were not provided to plaintiffs at the time the offers were made to the plaintiffs nor at any time until after trial.

It was not the plaintiffs' burden to figure out what the Rule 68 offers were worth when offered and for the ten days the plaintiffs had in which to consider the offers; rather, it was defendants' burden to put forth clearly defined terms upon which there could be a meeting of the minds. *Boorstein*, 107 F.R.D. at 33-34; *Johnson v. Penrod Drilling Co.*, 803 F.2d 867, 870 (5th Cir. 1986) ("Rule 68 is a mandatory rule designed to operate automatically by a comparison of two clearly defined figures."). Rule 68 "is a mandatory rule to be narrowly applied." 803 F.2d at 870.

Plaintiffs' counsel contacted one of the defendants' attorneys (Mr. Watson) by telephone on December 11, 1996, asking that the first offers be clarified. With regard to the second offers, plaintiffs' counsel, Ms. Sobieski, wrote to defendants' counsel requesting clarification [Exhibit 4 to Doc. 349]. No clarification was received in either instance and there was no "meeting of the minds" regarding the **meaning** of the Rule 68 offers. It is true that Rule 68 offers and acceptances are not like ordinary contract negotiations because in the latter situation the offeree is free to reject terms that he or she does not like with no adverse consequences.

In the Rule 68 situation, the offeree does so at his or her peril. The terms of the offer have to be sufficiently clear for the plaintiff to make an informed decision. If they are not, the offer is invalid.

Defendants argue that Ms. Sobieski's letter to defense counsel dated November 5, 1997, demonstrates that plaintiffs knew exactly what was being offered with the second offers of judgment. I cannot agree. First of all, the **offers** did not afford plaintiffs or the court with clearly defined figures against which the court can compare the judgment ultimately obtained. To be sure, the defendants have put a dollar value on the offers **after trial**, but the critical time is the ten days in which plaintiffs had to accept or reject the offer. Plaintiffs could have been provided with figures from Mr. Armstrong when the offers were made. For example, the plaintiffs could have been given an estimate of the value of a two-step merit pay increase to Frank Potter over his estimated working life from and after January 7, 1996. Plaintiffs could have hired an accountant to do that when the offer was made, but it was not plaintiffs obligation to do so; rather, it was up to the defendants to provide plaintiffs and this court with some reasonable value of the offers when made with which the final judgment can be compared. *Grosvenor v. Brienen*, 801 F.2d 944, 949 (7th Cir. 1986); 13 *Moore's Federal Practice* § 68.04 [6] (3d ed. 1998) (The effect of an offer must be judged by the terms of the offer as they existed at the time plaintiff rejected the offer). "[E]vidence dating from *after* acceptance or rejection of a Rule 68 offer is not relevant to the construction of its terms. . . ." *Moore's*, at 68-23.

Secondly, in her letter of November 5, 1997, Ms. Sobieski pointed out the uncertainty and ambiguity of defendants' offer of "an agreement by the defendants not to engage in any discriminatory practices in the future based on political affiliation." Plaintiffs sought a more specific, permanent injunction and argued that the

> counter-proposal [of defendants'] is unacceptably narrow, and I fear an argument in the future that "political affiliation" will be read unnecessarily restrictively, will not cover those who choose not to affiliate with either party, and that the city might hereafter take the position that they [sic] intended that language only to apply to adversary political parties.

From the outset of this litigation, the plaintiffs have considered injunctive relief to be an important part of the relief sought. They should not be penalized for refusing to accept what they considered to be a "watered down" and ambiguous offer to refrain from future violations of firefighters' First Amendment rights. This was an integral part of the defendants' offer. The plaintiffs' position was that without an injunction, their employment status would be subject to the vagaries that they had experienced in the past.

The defendants must have believed that their offer not to discriminate had some meaning and value or it would not have been included. The plaintiffs did not understand what it meant and communicated that to defendants. No clarification was received. The purpose of Rule 68 is to settle lawsuits. That purpose is frustrated where the offer is

too unclear to allow evaluation of it. *Boorstein*, 107 FRD at 34. The defendants could have clarified their Rule 68 offer not to discriminate by agreeing to an appropriately worded injunction, but they did not do so. As it was, plaintiffs had no reasonable basis to evaluate the worth of defendants' offer not to discriminate in the future.[8]

Chief William Potter received only one offer of judgment. He was offered his former administrative hourly rate for any hours in excess of forty at a rate of about $21 per hour. There was no specification of what his rate would be for the first forty hours per week. One might assume that it would be the approximate $15 per hour that the city had calculated as his new base rate. But, here again, it was up to defendant to spell that out in the offer or to clarify it if the plaintiff did not understand. The defendants did not do so. Plaintiffs contend that their counsel contacted defense counsel specifically about § 2(b) of the offer but received no clarification.

The undersigned is of the opinion that each of the offers of judgment must be construed based on all of the terms contained therein. In other words, for example, it would not be appropriate to just look at the $7501.00 in cash offered

8. The defendants did not have to offer equitable relief even though plaintiffs sought both equitable relief and damages. 13 *Moore's Federal Practice* § 68.04 [5](3d ed. 1998). The defendants did, however, include in their offers of judgment "an agreement . . . not to engage in any discriminatory practices in the future based upon political affiliation." Since this was included in the offers, it cannot be ignored by the court in deciding whether or not the terms of the Rule 68 offers were sufficiently clear.

Gary Sharpe in his second offer of judgment and make some determination of whether the judgment he obtained "beat" that figure. Rather, that offer of judgment and the others must be evaluated based on all proposed terms contained therein. "An offer that is invalid as to one term cannot be reformed by the court or partially accepted by a claimant." 13 *Moore's Federal Practice* § 68.04 [7] (3d ed. 1998). When so viewed, none of the offers of judgment provided plaintiffs with a clear baseline from which plaintiffs might have evaluated the merits of their case relative to the value of the offers. *Gavoni*, 164 F.3d at 1076. Because of the severe penalties imposed on plaintiffs under Rule 68, the defendants had the burden of tendering clear and concise offers, capable of comparison to the relief the plaintiffs expected to receive. *Id.*

The plaintiffs were under no obligation to move to strike the offers of judgment. *See Boorstein v. City of New York*, 107 FRD 31, 35 (S.D.N.Y. 1985) (motion to strike offer of judgment is procedurally permissible). Doing so would likely bring howls of protest from a defendant that plaintiffs were trying to prejudice the defendant by revealing that a settlement offer had been made. Furthermore, Rule 68 states that evidence of an offer not accepted is not admissible except in a proceeding to determine costs. *See generally,* 13 *Moore's Federal Practice* § 68.04 [2] (3d ed. 1998).

At all times, the burden was on defendants to propound offers of judgment that were clear, concise and capable of ready valuation by plaintiffs **at the time the offers were made** without resort to assumptions. The defendants' attempt to value the offers of judgment **at the time of the verdict** does not shed very much light on what the offers were worth

when made. The defendants could have refined their offers of proof in response to plaintiffs' inquiries but they did not do so. As a result, they are not binding on plaintiffs.

As prevailing parties, the plaintiffs are awarded their costs against the defendants.

VII. Summary

For the reasons indicated, the plaintiffs' motion will be denied with respect to the statute of limitations question, William Potter's Fair Labor Standards Act claim, and the court's refusal to award prejudgment interest.

The plaintiffs' motion to alter or amend judgment will be granted for the reasons indicated with respect to injunctive relief and the taxing of costs.

Order accordingly

FILE

s/ Robert P. Murrian
Robert P. Murrian
UNITED STATES MAGISTRATE JUDGE

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:96-cv-916
(MURRIAN)

GARY G. SHARPE, et al,

Plaintiffs,

v.

FIRE CHIEF BRUCE CURETON, et al,

Defendants.

ORDER

For the reasons stated in a Memorandum Opinion this day passed to the Clerk, it is

ORDERED AND ADJUDGED that the defendants' motion for judgment as a matter of law is **GRANTED** with respect to the 1995 transfer claims of William G. Potter, Kenneth F. Scarbrough, Frank E. Potter, and William H. McGinnis as is set out in the Memorandum Opinion entered on April 25, 2000, and the Memorandum Opinion filed herewith.

It is further **ORDERED AND ADJUDGED** that the plaintiffs' motion to alter or amend the second amended

judgment, is **GRANTED** in part and DENIED in part as follows. It is **ORDERED AND ADJUDGED** that judgment is entered in favor of the plaintiffs Gary G. Sharpe, William G. Potter, Kenneth Scarbrough, Frank Potter and William McGinnis, against defendants, Bruce Cureton and Victor Ashe, individually, and the City of Knoxville, but not as to defendant, Robert Pressley. Compensatory damages are awarded against defendants Bruce Cureton and Victor Ashe, individually, in the amount of $2,500.00 to plaintiff, Gary Sharpe; $6,500.00 to plaintiff, William G. Potter; and $1.00 to plaintiff William McGinnis. Compensatory damages in the amount of $3,250.00 are awarded to plaintiff, Kenneth Scarbrough, against defendant City of Knoxville and defendants, Bruce Cureton and Victor Ashe, individually. Compensatory damages in the amount of $3,750.00 are awarded to plaintiff Frank Potter against defendant City of Knoxville and defendants, Bruce Cureton and Victor Ashe, individually.

Judgment is entered in favor of defendant City of Knoxville in connection with plaintiff William Potter's Fair Labor Standards Act claim and plaintiff William Potter shall take nothing on that claim.

Plaintiffs' request for permanent injunction is **GRANTED.** Mayor Ashe is hereby enjoined from taking any adverse employment actions such as transfers, demotions, refusal to hire, refusal to promote, reduction of compensation or refusal to increase compensation of Knoxville Fire Department firefighters on account of their political beliefs and associations or their choice to remain neutral in political

matters. This injunction shall not apply, however, to any Knoxville Fire Department employees who are not covered by the city's civil service regulations.

Plaintiffs' request for front pay is **DENIED.** Plaintiffs' request for prejudgment interest is **DENIED.** Plaintiffs' motion to interview jurors is **DENIED.**

Plaintiffs are not awarded punitive damages.

Plaintiffs are awarded their costs as prevailing parties against the defendants and shall file their claim for costs within thirty (30) days of entry of this final judgment.

The Clerk shall enter this Order as the final judgment in this case.

IT IS SO ORDERED.

ENTER:

s/ Robert P. Murrian
Robert P. Murrian
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 10, 2003

Nos. 00-5805/6089/6361/6362

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY G. SHARPE, ET AL.,

Plaintiffs-Appellants/Cross-Appellees (00-5805/6089),
Plaintiffs-Appellees/Cross-Appellants (00-6361/6362),

v.

BRUCE CURETON, CHIEF IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES,

Defendants-Appellees/Cross-Appellants (00-5805/6089),
Defendants-Appellants/Cross-Appellees (00-6361/6362).

ROBERT PRESSLEY, DEPUTY FIRE CHIEF, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES,

Defendants-Appellees (00-5805), Defendant (00-6089),
Defendant/Cross-Appellee (00-6361/6362).

BEFORE: NORRIS and BATCHELDER, Circuit Judges; and FORESTER,* District Judge.

---

* Hon. Karl S. Forester, Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

Appendix D

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX E — ORDER OF THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE ENTERED APRIL 7, 2003

IN THE CHANCERY COURT FOR
KNOX COUNTY, TENNESSEE

No. 153997-3

CITY OF KNOXVILLE

Petitioner,

vs.

ROBERT B. CRISP, CECIL RISDEN, NEAL R. MANEY, STEVEN FOWLER, and THE CIVIL SERVICE MERIT BOARD FOR THE CITY OF KNOXVILLE,

Respondents.

ORDER

This cause came to be heard on the 12th day of February, 2003 on the appeal of the City of Knoxville from the Findings of Fact and Conclusions of Law of a hearing officer of the Civil Service Merit Board for the City of Knoxville, dated January 14, 2002, as amended by Corrected Order entered January 18, 2002, (a copy of which is attached hereto as *Exhibit 1*).

Having considered the Record created by the Civil Service hearing, the stipulations entered into by counsel during this proceeding regarding certain findings made by

the hearing officer (a copy of which is attached hereto as *Exhibit 2*), and after hearing the arguments of counsel, it is the opinion of this Court that the following findings of the hearing officer contained in the Findings of Fact and Conclusions of Law (*Exhibit 1 hereto*) are unsupported by evidence which is both substantial and material in light of the entire record: Nos. 3, 10, 34, 45, 50 and 51. These findings of the Hearing Officer are accordingly **REVERSED.** A copy of the Court's Memorandum Opinion is attached hereto as *Exhibit 3* and is incorporated herein by reference.

While the Court concludes that reasonable minds could differ as to the Hearing Officer's decision regarding Respondent Robert B. Crisp, the Court does not find that such was arbitrary or capricious or unsupported by substantial and material evidence and accordingly affirms his retroactive promotional date of April 22, 2001 to the position of Fire Officer.

The Court does find, however, that the Hearing Officer's decision regarding Respondents Neal R. Maney, Steven Fowler, and Cecil Risden was arbitrary or capricious and unsupported by substantial and material evidence. The Court hereby sets aside the decision of the Hearing Officer to promote Respondents Neal R. Maney, Steven Fowler, and Cecil Risden to the position of Fire Officer effective April 22, 2001, and instead orders that the effective promotional date for Respondents Neal R. Maney and Steven Fowler be September 9, 2001, the date on which they were promoted under a separate process that is not the subject of this action and that the effective promotional date for

Appendix E

Respondent Cecil Risden be March 24, 2002, the date on which he was expected to have been promoted under a separate process that is not the subject of this action.

The Clerk and Master is hereby directed to send certified copies of this Order to counsel of record at the addresses listed below. Costs are to be taxed to the Petitioner.

ENTER this 7 day April, 2003.

s/ Sharon Bell
SHARON BELL
CHANCELLOR

APPROVED FOR ENTRY:
s/ Debra C. Poplin
Debra C. Poplin
Deputy Law Director
Attorney for Petitioner
P.O. Box 1631
Knoxville, TN 37901
PID. NO #211077
(865) 215-2050

s/ Wanda G. Sobieski
Wanda Sobieski
Attorney for Respondents
Sobieski, Messer & Associates
900 S. Gay Street, Suite 1801
Knoxville, Tennessee 37902
(865) 546-7770

APPENDIX F — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE CIVIL SERVICE MERIT BOARD, CITY OF KNOXVILLE ENTERED JANUARY 14, 2002

CIVIL SERVICE MERIT BOARD
CITY OF KNOXVILLE

ROBERT B. CRISP, CECIL RISDEN, NEAL R. MANEY, and STEVEN M. FOWLER.

Grievants,

vs.

THE CITY OF KNOXVILLE,

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was came on for hearing on the 12th and 13th day of November, 2001, 27th and 28th day of December, 2001. This Hearing Officer will not repeat the allegations of the Grievants' forms herein but same is filed as collective exhibit one in this cause.

This hearing officer makes the following Findings of Fact:

1. That the Civil Service, for the City of Knoxville, at the direction of the fire department posted on April 15, 1999, a notice for the position of Fire Officer testing.

2. That the posting related that the examination process for Fire Officer will consist of a written exam – 100% of final score.

3. That for reasons unknown, Chief Hamlin decided to have oral interviews in approximately June of 1999 and same were performed in July of 1999.

4. That the first interview panel consisted of seven (7) individuals selected by Chief Hamlin and this Panel was advised by Pat Armstrong from the City of Knoxville, Department of Finance that there were twenty-two (22) positions funded and the committee understood that they were making nominations for twenty-two (22) positions of Fire Officers.

5. That the first interview Panel's findings and conclusions listed twenty-two candidates and that they recommended for promotion.

6. Included in the twenty-two recommended for promotion were Crisp, Fowler and Risden. Mr. Maney apparently did very poorly in the interview process and the Panel was also told Mr. Maney was not eligible for promotion.

7. The City wave no logical nor reasonable explanation as to why the promotions were not made following the first interview nor quite frankly, following the written test.

Appendix F

8. That promotions within the fire department are made in the sole discretion of its chief and that the chief does not have to follow any recommendations nor is he guided by test scores nor interview panel recommendations.

9. That at the time of the posting, there were at least twenty or twenty-two vacancies in the position of Fire Officer within the City of Knoxville Fire Department.

10. That the failure to fill these vacancies was costing the city somewhere between seventy and eighty thousand dollars per month in overtime pay.

11. The lawsuit, *Sharp vs. City of Knoxville,* an action by firefighters against the City of Knoxville, was decided on the 14th day of February, 2000.

12. That other promotions within the fire department occurred after April of 1999, and prior to the promotion of twelve firefighters in March of 2001.

13. That Chief Hamlin named a second interview panel which interview the applicants for these positions in July of 2000, that following the results of the second interview panel, it appeared that Robert Crisp was twenty-third on the list of applicants based on the two oral interviews and the written examination.

14. That on July 26, 2000, Chief Hamlin made a request to Karen Day, Civil Service Director, to increase the number of positions to be filled from twelve (12) to twenty-two (22).

15. That as a result of a federal injunction issued by Robert P. Murrian, United States Magistrate Judge, on the 26th of July, 2000, "Mayor Victor Ashe is hereby enjoined from taking any adverse employment actions such as transfers, demotions, refusal to hire, refusal to promote, reduction of compensation or refusal to increase compensation of the Knoxville Fire Department Firefighters on a count of their political beliefs and associations or their choice to remain neutral in political matters."

16. That as a result of this injunction, Victor Ashe, Mayor designated Randy Vineyard, Finance Director for the City of Knoxville to be the supervisor in charge of the fire department pursuant to a memorandum issued by Victor Ashe dated August 4, 2001.

17. That Chief Hamlin could not or did not make the promotions because of instructions or directions from Michael Kelly, Law Director.

18. That Randy Vineyard, without consultation with Chief Hamlin did, on the 30th of August, 2000, rescinded the request for twenty-two (22) positions to be filled and reduced the number to twelve (12).

19. That Randy Vineyard's explanation as to the reason was that there were other firefighters, in the meantime, that is since the original posting and testing, who had become eligible to apply for the position of a firefighter and therefore he thought it fair that they be given that opportunity to apply for promotion to the position of Fire Officer.

20. That Randy Vineyard did not visit fire halls, did not meet with firemen, and from all appearances based on the proof, was not involved in any decision making processed involving the lire department other than his rescission of the number to be promoted.

21. That a Civil Service Action was filed in February 2001, styled *Grande vs. The City of Knoxville*, which included most of the firefighters who had taken the test and applied for these positions. This was an effort to force the city of Knoxville, to fill the Fire Officer Positions.

22. That all of the members of the first interview panel with the exception of Chief Pressley, signed a written memorandum and/or letter to Chief Hamlin urging the filling of all vacant positions within the fire department and this was done on March 19, 2001.

23. That the second interview panel also wrote a letter on March 19, 2001, urging chief Hamlin to make the promotions and fill the positions.

24. That this Hearing Officer finds that Chief Hamlin, in fact, wanted to fill the positions.

25. That Robert Crisp had been active in earlier mayoral campaigns on behalf of Victor Ashe prior to 1995.

26. That Robert Crisp and/or his wife supported candidates other that Victor Ashe in the 1995 and 1999 campaigns.

Appendix F

27. That Robert Crisp signed a sheet on July 24, 1995, at a fire hall meeting indicating his support for Ivan Harmon for mayor.

28. That Robert Crisp had a medical condition known as Alpha 1, a respiratory condition that impacted his ability as an active firefighter.

29. That once this condition became known. Robert Crisp was transferred to the firefighter training center and performed his duties in a highly satisfactorily manner.

30. That on June 25, 1997, Dr. William Cloud, the city's medical officer, forwarded a memorandum to the fire chief and deputy fire chief reference Mr. Crisp's medical condition.

31. That Robert Crisp was never given a copy of this letter.

32. That Dr. Estes, a pulmonary specialist seen by Robert Crisp prepared a letter and forwarded it to the city of Knoxville indicating Crisp could perform a desk job free of smoke, but this letter was never entered in Robert Crisp's medical file and Dr. Cloud never saw it.

33. That Dr. Cloud, on March 28, 2001, wrote a letter to Chief Hamlin, Beverly Clemmer and Ron Mills, the latter two of the City of Knoxville Law Department, reference Robert Crisp even though Dr. Cloud had not seen Robert Crisp since 1996.

Appendix F

34. That Chief Hamlin and City Law Director, Michael Kelly went to see civil Service Director, Karen Day for the sole and exclusive purpose of attempting to disqualify Robert Crisp from eligibility to be promoted to Fire Officer.

35. That at the request of the fire chief, the Civil Service office posted for twenty (20) additional firefighters on or about the 16th of March, 2001, even though they had made no promotions reference the posting of April 15, 1999.

36. That on the 26th of March, 2001, twelve (12) firefighters who had tested for promotion were promoted to Fire Officer, none of which included the grievants.

37. That the Civil Service rules and regulations provide that when promotions are made, those who apply and are not selected for promotion, must be listed with the reasons that they were not promoted.

38. That on the March 26, 2001, list for promotions there was attached a list including Robert Crisp who was not promoted, the following language was included, "Mr. Crisp did not meet the minimum physical qualification test for Fire Officer and therefore, is not eligible for promotion to Fire Officer."

39. On the 23rd of February, 2001, the medical office faxed a follow-up medical examination questionnaire to Robert Crisp.

40. That on February 26, 2001, Robert Crisp received from the city of Knoxville medical services via fax, a copy of the original respiratory medical evaluation questionnaire and the PLHCP Follow-up Medical Examination form that was forwarded on March 23, 2001, which is blank even though that same form that had been faxed to him on February 23, 2001, signed by William W. Cloud, M.D. dated February 6, 2001, had directions stating that he should be examined by a pulmonary specialist.

41. That on March 6, 2001, Assistant Chief Mikael H. Roberts forwarded a memorandum to master firefighter Robert B. Crisp, Jr. stating that Chief Hamlin had instructed him, Roberts, to follow-up on Dr. Cloud's request that Crisp verify that he has an appointment with a pulmonary specialist by March 9.

42. That Robert Crisp had recommended Mr. Gary Sharp, the same Sharp who had a pending suit against the City of Knoxville, for a position on the Mayor's Advisory Committee.

43. That Assistant Chief Pressley had stated in the discussion with the first interview panel that if Robert Crisp were promoted, he would, within one year, place him in the most active fire hall in the city of Knoxville.

44. That Chief Hamlin had made statements to the effect that Robert Crisp was a thorn in the mayor's side and was an embarrassment to the mayor.

45. That Chief Hamlin had further made the statement that Robert Crisp was not promotable and that Mayor Ashe would not sign any promotion papers that had Robert Crisp's name included.

46. That there was no logical nor valid reason stated why these promotions should not have been made shortly after the written examination in 1999 following the first interview panel, nor after the second interview process.

47. That the failure to make the promotions cost the city of Knoxville hundreds of thousands of dollars in overtime pay which was totally unnecessary.

48. That the first oral interview committee was told that Neal Maney was ineligible for promotion because he had had a suspension within the restricted time period.

49. That Neal Maney was, in fact, eligible for promotion as he did not have a suspension from duty that would have prohibited him from being promoted.

50. Long before the issuance of the injunction by Robert P. Murrian, the powers that be within the City of Knoxville and its fire department knew that Mayor Ashe would not, if possible, promote Robert Crisp and this was not forgotten by the powers that be following the injunction and Mayor Ashe's transfer of power to Randy Vineyard.

51. That had Robert Crisp not been a candidate for promotion, at least twenty-two (22) promotions would have been made months before the March 26, 2001 date.

Appendix F

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

A. That Robert B. Crisp, Jr. was denied promotion for political reasons and that his promotion should be retroactive to March 26, 2001, with all back pay, seniority and benefits to which he would have been entitled had he been promoted at that time.

B. That the City's failure to promote or fill the twenty-two (22) positions in March of 2001 was an effort to deny Robert Crisp a promotion and that the failure to promote the twenty-two (22) adversely impacted Neal R. Maney, Steven M. Fowler and Cecil Risden all of whom would have been promoted had the twenty-two (22) positions been filled. Accordingly, this Hearing Officer directs that these three (3) be promoted retroactively to March 26, 2001, with all back pay and other benefits to which they would have been entitled.

ENTER this the 14th day of January 2002.

s/ Bill W. Petty
BILL W. PETTY, Hearing Officer

APPENDIX G — CORRECTED ORDER OF THE CIVIL SERVICE MERIT BOARD, CITY OF KNOXVILLE DATED JANUARY 18, 2002

CIVIL SERVICE MERIT BOARD
CITY OF KNOXVILLE

ROBERT B. CRISP, CECIL RISDEN, NEAL R. MANEY, and STEVEN M. FOWLER,

Grievants,

vs.

THE CITY OF KNOXVILLE,

Respondent.

CORRECTED ORDER

That the Findings of Fact and Conclusions of Law executed and filed on the 14th day of January, 2002, reflects that the promotions-reference the Grievants should be retroactive to March 26, 2001. This is in error in that the promotion to Fire Officer which occurred following the Grande Grievance was effective April 22, 2001.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the promotions reference Robert B. Crisp, Jr., Neal R. Maney, Steven M. Fowler and Cecil Risden shall be effective the 22nd day of April, 2001 and those promoted thereafter shall have their promotions retroactive to that date and Cecil Risden shall be promoted as of that date that is, April 22, 2001.

Appendix G

This 18th day of January, 2002.

s/ Bill W. Petty
BILL W. PETTY, Hearing Officer